MICHIGAN SUPREME COURT

PUBLIC HEARING
May 12, 2010

CHIEF JUSTICE KELLY: Good morning ladies and gentlemen. We're glad to see you in the courtroom today. We're glad to be here. The first part of our - of our activities this morning involves the public hearing on a group of court rules that we're contemplating. And this is the opportunity for the public to be heard with respect to these rules. We have I understand three people prepared to speak to us on Rule 2009-06 of the Rules of Professional Conduct. Mr. Victor would you like to start?

ITEM 2 - 2009-06 - Rules of Professional Conduct

MR. VICTOR: Thank you, good morning. Madam Chief Justice, Justices of this honorable Court. My name is Daniel Victor and I speak on behalf of myself this morning and other lawyers similarly situated to me practicing exclusively in the area of family law here in the state of Michigan. I'm going to refer first to the order itself dated November 24, 2009 where we have the Attorney Grievance Commission's proposal indicating that "a lawyer shall not enter into an agreement for, charge, or collect any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement in lieu thereof." My job is to secure a divorce for people. Their proposal is that I am not allowed to be paid in order to do my job. Not being able to charge a fee that's contingent upon securing the divorce means that I'm basically out of a job. Now that may not be what they meant, but that is what they wrote. The word contingent simply doesn't apply because a lawyer who is going to provide the service of providing a client with a divorce obviously should be able to charge for it. I think what the problem that they are trying to create, not necessarily elucidate, is one where they don't trust lawyers to bill ethically at the conclusion of a matter based on the services provided as opposed to at the forefront of the case based on knowing nothing at all about the case except what they tell the client they're going to charge by the hour. This poses several problems for the client and the lawyer alike. The conclusion is that it rewards poor lawyering, it undercompensates good lawyering, and it creates a conflict of interest for the client. Charging by the hour in itself, just like charging in any other

fashion, is not perfect. And the only way to mitigate against the conflict of interest that is inherent in charging by the hour is to allow for alternative forms of billing. The conflict of interest of which I speak is, of course, that a client especially in a domestic relations matter has an interest, a self-interest in making sure that that matter is handled efficiently and as - for as little money as possible. And we know that in a divorce case the money - the amount of money that the parties start with is the most they're gonna have. The job of a divorce lawyer is never to create more money; it's not transactional work. When the parties are divorced, they're each going to have less. And, of course, they're going to want the divorce to last quickly as possible, not as long as possible. The lawyer on the other hand who charges by the hour is going to want, if they're interested in their own financial future, for a divorce to last as long possible - to prolong litigation. And every lawyer knows what to do and how to do things that are going to cause acrimony and prolong litigation. And there's an inherent conflict of interest there between the client's interest and the lawyer's financial interest. Now that cannot be - it's inevitable.

CHIEF JUSTICE KELLY: Let me just interrupt you to ask you this. The question - the problem that we've seen in a number of cases involves a retention agreement which proposes to charge by the hour, but also proposes a retention amount which is nonrefundable up front. And we've seen several cases where the client decided early on after retaining the attorney not to go forward with the divorce, and then found that he or she had put down a large amount as a retainer which could not be recovered.

MR. VICTOR: Well, and your question is doesn't that pose a potential problem I suspect.

CHIEF JUSTICE KELLY: Right.

MR. VICTOR: And the answer to that is that retainer agreement does two things. It takes me - let's say I'm the recipient of the retainer - it takes me off the market prospectively for any future clients who come in with similar cases. Not only in general, it takes me off the market from that person's spouse. So now I have to accept a retainer agreement, and in exchange for that I am now unable let's say to work on other matters, but I'm also there unable - because of the conflict of interest rules - unable to represent an adverse party let's say in a future divorce. So if that case is withdrawn and I have done nothing except drafted a complaint and

been available to the client, depending on the size of the retainer I would feel potentially a duty to refund it. Now I don't have to do that, and the client and the lawyer certainly have a legal contract, if that's what it is they do sign - hopefully do sign a retainer agreement, and if the lawyer believes that his or her work to be hired just to be that person's lawyer is let's say $10,000 and the client agrees that I'm going to pay that lawyer $10,000 just to be my lawyer that money when earned upon receipt takes the lawyer off the market and so it's not like the client doesn't get anything in return and I have - I can tell you that I have had those cases where I have been retained and done very minimal work on the case, the case has been dismissed and based on the work that I've done - not how long it took me to do it - but based on the work that I've done I've refunded the retainer - the unused portion of the retainer - to the client. I didn't have to do it, the contract said - didn't say I have to do but I have.

CHIEF JUSTICE KELLY: Well, that's the client's problem that we've run into where a retainer of maybe $10,000 was retained even though the person - or the client ultimately only spent a short time with the attorney before withdrawing the divorce action.

MR. VICTOR: I understand that, however -

JUSTICE YOUNG: Can I -

MR. VICTOR: Yes.

JUSTICE YOUNG: The - I understand your argument about the economic question of withdrawing yourself from other matters. But aren't all fee agreements subject to a reasonableness test.

MR. VICTOR: Absolutely, your honor.

JUSTICE YOUNG: So that even if you contract with a person - lawfully contract for some retention fee for the privileges of retaining your services as opposed to them being used elsewhere, isn't that still subject to an ultimate reasonableness standard?

MR. VICTOR: Of course, and the reality is the only way to most perfectly apply that reasonableness standard, your honor, is at the conclusion of the matter when I know what I've done. When I know how complex or not complex the case was. When I know how acrimonious or not acrimonious the case was. For me to just say to a client this is gonna be $300 or $200 per hour and

that $300 per hour is gonna be charged whether I'm drafting your settlement agreement which is the most important document in your life right now or reviewing a subpoena that the other side issued doesn't make any sense. You don't get the same value for the time which is why applying dollars times time alone is a totally inaccurate and unethical way to bill in most cases. The reasonableness standard can only be applied at the conclusion of a matter which in Justice Kelly's example would be almost immediately at which time I am responsible to the client to charge only what is reasonable and that's why in those cases I have refunded that retainer because, quite frankly, although it was earned by me simply by being the lawyer, it didn't seem reasonable to keep the entire amount.

CHIEF JUSTICE KELLY: Are there other questions? Thank you, Mr. Victor.

MR. VICTOR: May I add one thing - or -

CHIEF JUSTICE KELLY: You're out of time.

MR. VICTOR: Oh, I'm out of time. Well, then thank you very much for your time this morning.

CHIEF JUSTICE KELLY: Thank you.

JUSTICE WEAVER: I'd like to hear what he had to say.

CHIEF JUSTICE KELLY: Okay. Go right ahead then - come back and we will -

JUSTICE WEAVER: I'd like to hear what you had to say.

MR. VICTOR: Oh, I'm sorry Justice Weaver. What I wanted to say is that the Attorney Grievance Commission has framed the issue of value billing as value added - some kind of bonus or chip that the lawyer decides arbitrarily is owed to him or her because of the work done. That couldn't be farther from the truth. This is not an arbitrary determination that the AGC thinks that they're trying to prevent. This is a meeting of the minds at the conclusion of a matter when both client and lawyer can look retrospectively with hindsight and see not what kind of bonus has been earned or warranted, but what kind of value was actually provided. And a very, very good lawyer or in some cases two competent lawyers can do a job in 15 minutes that a less competent, less qualified, less experienced lawyer can do in 2 hours. And according to the AGC the good, experienced,

competent lawyer gets paid less by charging by the hour than the poor, incompetent lawyer who takes twice as long to do a worse job and that's why this isn't a tip or a gratuity at the end of the case.

JUSTICE YOUNG: No, you're undercutting your argument now.

MR. VICTOR: I'm sorry?

JUSTICE YOUNG: Presumably the value of your experience is reflected in your hourly rate. The retainer is a lost opportunity compensation, it isn't a value based on your experience.

MR. VICTOR: Not exactly judge; not exactly because the value per the hour as I indicated before if what I'm doing - let's say in 15 minutes I come up with a theory that saves the client $1 million am I supposed to charge $50,000 per hour for the time it took me to come up with that one idea and $20.00 an hour for the time it takes me to drive to the courthouse. If I just charge a fixed number regardless of the work I'm doing it bears no significance on the value of the service I'm providing because the time it takes me to drive to the -

JUSTICE YOUNG: What is the rationale of the retention agreement, again?

MR. VICTOR: The rationale?

JUSTICE YOUNG: Yeah. I thought it was the lost opportunity cost for you agreeing to serve as this client's lawyer versus the other opportunities that you were going to turn down because you have to spend time on client A's work.

MR. VICTOR: Those are two different issues.

JUSTICE YOUNG: I don't understand how the lost opportunity supports a sort of a fee enhancement after the conclusion of a - of an arrangement where the lawyer comes up with a creative solution.

MR. VICTOR: Well, it's not a fee enhancement because -

JUSTICE YOUNG: I didn't say it was a fee enhancement, I - but you seem to be arguing that it can serve as a fee enhancement if the matter is shortened by the brilliance of the lawyer.

MR. VICTOR: It's - then it's not a fee enhancement because the lawyer in that case never charged by the hour to begin with, it's just the fee let's say for the brilliance. A lawyer in that scenario wouldn't keep track of his or her time, they would keep track of the work that was done, but it wouldn't be a lawyer charging a retainer for the lost opportunity, then charging by the hour, then at the end of the case charging more for the service provided, that's not what I'm proposing. I'm proposing a retainer agreement to take the lawyer out of the market for anyone else, to do that work, not charge by the hour because, quite frankly, hourly work in domestic relations matters is a conflict of interest, and then at the conclusion of the matter charge a fee, not an enhanced fee, but a fee.

JUSTICE YOUNG: Okay.

MR. VICTOR: Thank you for your time your honors.

CHIEF JUSTICE KELLY: Thank you.

JUSTICE WEAVER: Thank you.

CHIEF JUSTICE KELLY: Mr. Gurwin.

MR. GURWIN: Good morning all.

CHIEF JUSTICE KELLY: Good morning.

MR. GURWIN: When Mr. Corbin said to me that I had 3 minutes to speak to you this morning I said well that's kind of interesting because I know that I can prepare a 30 minute presentation much better than I can prepare a 3 minute presentation, and what's gonna be included. And I don't wish to be redundant, and I know that all of you Justices have read the two letters that were sent to you. One on behalf of the American Academy of Matrimonial Lawyers by J. Cunningham, and the other sent on behalf of 35 different lawyers. And I'm here today as a representative of the AAML, but also as one of those 35 lawyers all of whom endorse the proposal of the Family Law Section of the State Bar as well as the AAML that there's nothing broken and there's no reason to fix it. There's no doubt in my mind and I'm very passionate on the subject and have been lecturing and teaching on this for 30 - 35 years before this matter ever became to the forefront. And I'm convinced that Mr. Agacinski and those who propose these changes have a solution and they're looking for a problem to fix and there

isn't one. I don't deny that we have from time to time some unusual circumstances that cry out for some relief where it appears as if a specific lawyer may be taking advantage of a client in a situation where, as Justice Young has pointed out, it would be beyond a reasonable fee. And reasonable covers those unusual circumstances. Now the 35 lawyers who signed the letter of February 17th, they're composed of the following. Seven present or former law professors; 12 chairs of the Family Law Section, past or present; 25 members of the AAML; 1 past chairman of the Attorney Grievance Commission; 1 past chairman of the Attorney Discipline Board, that happens to be me; 1 past chairman of the Judicial Tenure Commission; and the President of the Michigan State Bar Foundation, Margo Nichols. Now all of us can't be totally crazy, and when I have gone through and analyzed this I said to myself the practice of law today is so far different than it was when I started 51½ years when the State Bar gave me this wonderful button a year ago, and when I read Scott Turow's column in the ABA Journal "The Billable Hour Must Die" he hits it right on the nose. And he goes through in several pages pointing out not only is it a conflict of interest, as Mr. Victor pointed out which I could expand upon, but it may well be unethical because it is so much within the control of the lawyer to determine how many hours. Not long ago a lawyer indicated to me in a conversation I had, and I can't vouch for this being accurate because it's hearsay, but that lawyer said to me that he was settling a case with another lawyer on a family law matter - a divorce case. The case was virtually settled. And the other lawyer said to him I can't settle this case with you now, I don't even have enough hours in to justify my retainer. And I'm thinking to myself well, if that doesn't demonstrate conflict of interest what does. When I started practicing in 1959, a) I didn't have an electric typewriter, we had no copy machines, we had no computers, we had no Lexus or computerized research. We didn't have cell phones, we didn't have any of the modern equipment that we have today that enables us to turn out documents in one-tenth of the time. I used to call in a secretary and dictate to a stenographer who took it in shorthand - today, what's shorthand, nobody knows what that is. And we had carbon paper, and if there was a mistake it was done all over again. That isn't the way it is, and so I can turn out in 15 or 20 minutes what used to take 4 or 5 hours. I can't charge $1,000 an hour for my time, Justice Young. If I did that I wouldn't - I'd never get a client. But I have an engagement letter which specifically says that I don't charge by the hour unless it's a relatively simple case and we have an agreement to that affect. And that when this matter is over with we'll sit down together and we'll decide what a

reasonable fee is. And in all of the time I've been practicing I have had only three instances in which I've ever had to go to court over a fee and none of them involved the issue of the amount of the fee based upon a value added or something in excess of an hourly rate.

CHIEF JUSTICE KELLY: Aren't you really arguing to us trust us - trust us to be fair with our client.

MR. GURWIN: The client needs to trust the lawyer; the lawyer needs to trust the client. It's that kind of a relationship.

CHIEF JUSTICE KELLY: We do have cases up here where the lawyer held money despite the fact that there's no possible way that that amount of money could have been earned for the amount of work done.

MR. GURWIN: Then it was an unreasonable fee, and an unreasonable fee is covered in the rules today. And those particular cases they need to be looked at on a case-by-case basis. Ninety-nine percent of the lawyers who practice in the family law area, and it's a very collegial group. We work together for the most part very well and trust each other well and the members of the Academy and the Family Law Section more so in Michigan than in most other states and I'm active throughout the country in this - we trust each other here. And we work together well. And I suggest to you that on those cases in which it is obvious that the fee has not been earned, even in my case where I say my retainer fee or engagement is a minimum fee for handling your case, and I don't have to return it. If there is a - if the parties reconciled, if they decided they wanted to change lawyers very soon, that's fine, but one thing we have to face and that is the reality that there are people who intentionally meet with 10 different lawyers, give each of them a retainer for the purpose of disqualifying them so this lawyer cannot represent the spouse. And then the spouse goes I can't represent you I already had a conference with your husband or wife. And consequently unless you get a substantial retainer to protect yourself you're out on the street.

CHIEF JUSTICE KELLY: Are you saying there's no other way to protect yourself?

MR. GURWIN: Absolutely not. As a matter of fact, if a client comes in to meet with me and spends an hour of time with me and tells me his or her story and doesn't even retain me and

doesn't even give me a retainer fee I am disqualified from representing that spouse because I now have privileged information that I can't use. And that happens more than you might realize. There are some lawyers who will not even talk to a client unless there is a retainer fee paid in advance or whatever information is given to a secretary and not even passed to the lawyer. If - it's not an easy thing. We're in a different kind of an arena than lawyers who are doing other kinds of work like tort work. And, of course, the key - the thing that I object to in the proposed rule is the use of the word contingent. Contingent does not mean what the Attorney Grievance Commission wants it to mean. We can't get a contingent fee on a child custody case, there's no percentage of an amount that you can get. You can't get a contingent fee on an alimony case because the alimony could terminate in a year if the spouse remarries. You can't get a contingent fee based upon a percentage of the property when you don't even know what the property may necessarily be. And there are so many aspects of things that can't even be valued, they're all interrelated. And so, consequently, you don't know whether the case is gonna be settled, whether it's gonna be tried, how difficult your opponent's gonna be, who the judge is gonna be, whether or not you're gonna end up in the Court of Appeals until the case is over. And so in my engagement fee I indicate that I keep track of my hours - my law firm requires that I do that for cost accounting - but an hour doesn't necessarily have 60 minutes in it. Some hours have an hour and a half and some hours have 30 minutes. If I'm going to the courthouse on a Wednesday morning on a motion day and I sit there for 4 hours, I'm not gonna charge my client for 4 hours when I'm waiting for the case to be called. I'll never charge more than 2 hours for that and sometimes even that's a lot. Ninety-five to ninety-eight percent of the cases are run of the mill, garden variety stuff that doesn't include high assets and doesn't include the kind of sophistication and tax risks we're talking about in this small number of cases. And I submit to you that you can't give a flat fee in advance. I can give the client some range as to what I think it might be. Is it gonna be between $10,000 and $25,000, is it likely to be $50,000 to $100,000. Are the assets in the $100,000s or in the millions, or in some cases close to two billion - in one case that I had that I argued before this Court. And in that particular case there's no hourly rate besides which how much malpractice insurance can we cover. Normally, we might have $2 million to $5 million whether we're a sole practitioner or we're in a large firm, but the potential for malpractice in some of these divorce cases particularly when the emotions are so high is enormous. And there have been so

many malpractice cases brought and obviously that risk has to be protected against. In my case, and I know that's true for the people with whom I work regularly - I'm not gonna name these names - they're all on this letter you know who they are. When it's over with we sit down with the client, and we reach an agreement as to what the client is gonna pay. I mentioned the three times I didn't. One I got paid with a bad check that had nothing to do with the fee. Another one was just a very difficult woman that I had the money in my client's trust account and I wanted to share it with her in proportion to what we're entitled to. She refused to come in and even talk to me.

CHIEF JUSTICE KELLY: So now you've had three minutes - that's way more than three minutes.

MR. GURWIN: Right, I've had way more than three minutes. But the point I want to make is there is no problem, we don't need to change the rule. It's worked well for 50 some years. Yes, from time to time there are these unusual cases that you will have no matter what the rule is. But you can't as they say throw out the baby with the bash water - throw out the baby with the water because if we do that it's going to make it virtually impossible for lawyers who are representing wealthy clients or sophisticated cases to affectively do their job and to get paid for the value of what they do. I appreciate and I thank you for the time that you've given me.

CHIEF JUSTICE KELLY: Do you have questions for Mr. Gurwin? Thank you, sir. Mr. Bacon.

MR. BACON: I'm Terry Bacon, we - I and my successor as general counsel with the Varnum Law Firm submitted some extensive written comments so I'm obviously not gonna get through all of those in a three minute fashion. I'm gonna address just a couple overarching ones, but I'm glad to answer any questions that you have. I guess I'm the only nonmatrimonial lawyer that's speaking here today. I wanted with the three minute time period, I do want to thank the Supreme Court and its staff for what it did with its time and obviously extensive work with respect to the prior proposals and coming back and it is obvious that a number of the comments submitted the last time were taken into account with the redrafting. It was not an easy job and I for one really appreciate it as I went through the new rules and realized how much was changed from the earlier proposals that addressed various peoples' comments. There is a point that I think John Allen from Varnum has submitted that I think needs to be kept in mind. I don't think it's anything

anybody proposes, but he's had a couple of proposals to make sure that whatever you adopt that you have a transition rule that covers the time for transition into any new rules, and addressing that these would not be applied retroactively to conduct or agreements entered before you adopt these rules, and I do think that's important. And one overarching theme in our comments is that if there is substantive commentary in a rule that it - in the comments to a rule that ought to be revised and put in the rule itself. That a commentary can be if you want to be illustrative of what occurs, but not left which is - currently still exists in these proposals to some extent, less than before, where the comment is contrary to the rule. And we should not be leaving those in place. That actually exists now in the current rules too. I think that - one example which was not what we commented on, but I believe some other people did in connection with Rule 3.3(b). This is the one about correcting a lawyer's attempt to remediate if he's aware that the client or another person is testifying falsely or committing fraud in the court. The commentary makes it clear, and the very first sentence in the commentary says this applies to a lawyer representing a client before a tribunal. That is not in the rule and I believe some of the comments were posing the possibility that a lawyer sitting in the audience is aware of something that occurs that the rule might literally be read to say that lawyer must take some action as opposed to a lawyer in the proceeding. That's one example which we didn't highlight until I read the other comments where the comment really is and should be part of the rule - that statement. I think we've given the illustration in the past about the Rule 1.8(a) - the business transaction with a client. Literally applied it would prevent a lawyer from buying a donut from the client's donut shop, or a client buying a donut from the lawyer's donut shop without written consents, waivers, and advice to get separate counsel. While fortunately we have a great deal of trust that the Attorney Grievance Commission and the Attorney Discipline Board would not pursue such a silly scenario - literally the rule would apply to that and that's - there's comments in the commentary that would affect half of that and that's the kind of thing that ought to be in the rule to make it clear for the standard commercial transaction is not what is intended. A second aspect of our rules is don't have rules that require lawyers to be advising someone other than that lawyer's client in that matter. It creates or exacerbates the conflict that might exist. Now they don't always use the word advise, they say well you've got to explain. Well, that is advising. And the one exception that I would say whether you call it advising or not is an admonition that lawyers tell someone or that it is

better if they get their own separate counsel. I don't think that imposes too much of a burden, it doesn't have to be terribly complicated, but it gets away from lawyers advising people that are not their clients. My three minutes is up. Let me just if I can - I think most of the comments all agree that - maybe it's all of them none of them disagree - don't require written agreements and consents. Don't make that the basis for discipline - the technical violation. There are alternatives to encourage written agreements and consents and we've suggested some. But where there is no dispute, for example in a conflict consent - that the client consented to the conflict, it was adequately discussed and the only thing that didn't happen was something in writing afterwards, that should not be a basis for discipline.

JUSTICE YOUNG: Can I ask you a question?

MR. BACON: Yes.

JUSTICE YOUNG: You seemed to fairly comprehensively looked at the published rules. Is this an enterprise that is in search of a solution for which there is no problem?

MR. BACON: Well -

JUSTICE YOUNG: Should we - is this, although labor intensive, something that we should just chuck?

MR. BACON: There are - I think we had said this the last time. I think it is a good practice for the Court to review the rules every so often and see what needs to be changed because the society and the practice does change over time. The last time this was done thoroughly was back in the 1980s. And so there is a benefit to looking at those and seeing what might need to be updated and changed or what we've learned -

JUSTICE YOUNG: Well, we've done that. My question is have we produced a (inaudible)?

MR. BACON: Well, there are some things that do need to be changed, and I - and I think we've commenting on a few of those. One example might be that rule 1.8(b) - the donut - or (a) - you know the donut shop case, that's something to be corrected. Separate from this and I gave my comments the last time, I would say the Court ought to thoroughly review and throw out most of its rules in the advertising restrictions and solicitation restrictions.

JUSTICE CORRIGAN: Mr. Bacon? To be clear, sir, I know that you filed extensive comments, we have almost a 120 page staff report that we've had to digest, is the one short letter that you've sent that indicates which rules you believe need to be changed so that you could just give us on one page the ones that you think warrant that. Have you done that? Would you do that so we'd have it?

MR. BACON: We've not send in a one page -

JUSTICE CORRIGAN: Well, just an index - just an index of the ones - We have studied these rules -

MR. BACON: Yeah.

JUSTICE CORRIGAN: but we'd like an index of the ones you think need to be - if you will - updated or modified. That would be very helpful.

MR. BACON: I could certainly send something like that in.

JUSTICE YOUNG: I think that would be helpful. I think one of the goals here was to address one of the issues you've raised which is where the commentary is - is more - it tells what the rule is - it should be in the rules themselves because the commentary are not binding, the rules are.

MR. BACON: Yes.

JUSTICE YOUNG: So I think that that was certainly one of our conscious goals where we did revisions to bring into the rule the actual rule instead of having the commentary wag the rule.

MR. BACON: And I think that was done in some of the rules. I think there were still others that needed to be clearer. I do not have a single list of the rules. When I submitted comments back to the last one it was more extensive even than this, and it was really intended to be able to make sure that one person at least went through them all and had some comments because I had been disappointed in the fact that the State Bar Ethics Committee had not done so - with legitimate motives let me make sure that's clear - there is a - there is a value in having Michigan's rules be identical to what is the ABA rules, that has some value to it. I think that value is exceeded on the other side by making sure our rules are the correct rules that ought

to be there. There is a rule that came up and I would say that it fits one other designation of what I would say the rule is we want to the rule to be clear.

JUSTICE YOUNG: Yes.

MR. BACON: One example has been some discussion this morning about contingency fees, and there are opinions apparently in various states as to what is a contingency fee and whether an enhanced fee after the fact amounts to be a contingency. There's a Michigan Ethics opinion that says it's a contingency. There are apparently cases in Illinois, in Pennsylvania or some other state - Maryland who say it's not. Other states, at least three or four, that say it is. That is a value I believe a court can add specifically in the rulemaking function to say based on the policy that you're looking for is that a contingency or isn't it. There is no definition in our rule of a contingency. That would be something that I think people will have disagreement as to the policy, that's your choices to make. I think it is a value to all lawyers that that choice be made clear and not only arise when some poor lawyer is now subject to a grievance and discipline.

JUSTICE CORRIGAN: You and your colleagues take on what needs attention in bullet points - not with long essays attached - just bullet points about the rules that you think need modernizing, that would really assist my thought process so thank you.

MR. BACON: That is something that certainly we could do, or you could do it as putting a committee together of some Bar people specifically -

JUSTICE CORRIGAN: We've had a lot of committees.

MR. BACON: Well, specifically for that purpose of what are the rules that really need changing, but -

JUSTICE WEAVER: Well, Mr. Bacon you've seem to have given a lot of time to it. I was gonna ask you the same - request of you're the same thing that Justice Corrigan did. In addition to that, I think if you will just zero in on the five most important things you need changed - you feel need changing, and also zero in on if they're five that don't need changing, that are the priorities in your mind.

MR. BACON: That's certainly something that -

JUSTICE WEAVER: And you can bullet them or you can do it you know -

MR. BACON: That's something we can try and do in part that was not -

JUSTICE WEAVER: And then your other ones are of various things - they may be things you think need changing but they're not changed well. You know, who knows. But you've taken the time to do a lot of - talk about this and a lot of study.

MR. BACON: Part of what we intended to do was we thought there would be other people that would be actually doing that role and submitting with respect to the rule that is honking them off the most one way or the other. And certainly John Allen probably picked some that were important to him, the matrimonial lawyers have picked some that are important to them. Those that are involved with nonrefundable retainers are focused on that issue. What I and Ms. Decker were trying to do was letting everybody else do that; we will give general comments. But we can also go back and say okay, here's what - after looking at it the five rules that we think need changing or something.

JUSTICE YOUNG: I mean I -

JUSTICE WEAVER: And five that don't.

JUSTICE YOUNG: Oh, I absolutely think it is critical - clarity so we know what our obligations ethically are and that the rule contain all of the principles that we are obligated to follow that we look to the commentary only for color commentary not - not to vary what the principles are in the - so that I think is a very important function you can perform for the Court and all the attorneys in the state.

MR. BACON: Well, thank you for your -

JUSTICE WEAVER: I mean you don't have to do it. It's absolutely like you're on a committee and you raised your hand and now you're appointed the chair here. But you obviously have an interest so now we're asking to get really specific. And if you don't want to it fine.

MR. BACON: I will certainly go back and talk and see. I'm retiring not too far distant future, but I can focus some effort

on that. Part of what - the reason that we submitted these is that I've been doing this sort of thing for between 25 and 30 years and I see both inside my firm and outside my firm lawyers generally that try to do the right thing, try to comply. They want to do the right thing, they don't want something though that is the Catch-22 for what they do.

JUSTICE YOUNG: Right.

MR. BACON: Thank you, very much.

CHIEF JUSTICE KELLY: Thank you, Mr. Bacon. There being no others who've signed up to speak at this public hearing the hearing is now concluded.